HARVARD LAW REVIEW

Published monthly, during the Academic Year, by Harvard Law Students

SUBSCRIPTION PRICE, $4.50 PER ANNUM . . . . . 60 CENTS PER NUMBER

LAWLESS ENFORCEMENT OF LAW. — During the past year no less than forty-four convictions were reversed by appellate tribunals in the United States for flagrant misconduct of the public prosecutor or of the trial judge whereby the accused was deprived of a fair trial. In thirty-three of these cases the district attorney made inflammatory appeals to prejudice upon matters not properly before the jury. In three of them the district attorney extorted confessions or coerced witnesses by palpably unlawful methods. In four, witnesses were so browbeaten during the trial as to prevent the accused from fairly making his case. In two, the trial judge interposed with a high hand to extort testimony unfavorable to the accused or to intimidate witnesses for the accused. It is significant that these cases come from every part of the country and from every sort of court. Thus, in 37 New York Criminal Reports, reporting important decisions in criminal causes in the courts of New York between May 31, 1918, and June 6, 1919, we find five convictions reversed for improper conduct of the district attorney in argument or in the course of the trial,[1] one case of an extorted confession,[2] one of intemperate

[1] People *v.* Esposito, 224 N. Y. 370, 37 N. Y. Crim. 180; People *v.* Marcellus, 184 App. Div. 711, 37 N. Y. Crim. 192; People *v.* Klein, 185 App. Div. 86, 37 N. Y. Crim. 226; People *v.* Teiper, 186 App. Div. 830, 37 N. Y. Crim. 410. In People *v.* Montlake, 184 App. Div. 578, 37 N. Y. Crim. 132, a mistrial resulted from persistent misconduct of the district attorney in calling counsel for the accused "attorney for the pickpocket trust" and a pickpocket himself. See also People *v.* Reilly, 224 N. Y. 90; People *v.* De Simone, 181 App. Div. 840.

[2] People *v.* Crossman, 184 App. Div. 724, 37 N. Y. Crim. 198.

action of the trial judge in flagrant disregard of the rights of the accused,[3] and one of high-handed action by the police, sustained by an inferior court, at the expense of undoubted rights of the citizen.[4] Appellate courts interfere reluctantly in these cases and set aside convictions only when convinced that the conduct of the district attorney was flagrant and highly prejudicial. Hence it is a fair inference that the evil is even more extensive than the face of the reports discloses. Indeed, going simply on the face of the reports, we must turn back to the courts of the Stuarts for examples of the sort of thing that is becoming commonplace with American prosecutors.[5]

In *People* v. *Esposito* [6] on a trial for murder, the district attorney urged on the jury that the name of the accused meant "bastard" and that he was an alien and within draft age. In *Anderson* v. *State* [7] accused was a negro tenant who, when threatened by his white landlord, killed the latter, as he claimed, in self-defense. It appeared that he was a friendless negro, without means or influence. The district attorney argued that as the citizens of the county had "restrained and withheld themselves until the trial" and had not lynched the accused, the jury should convict him. He also recounted the horrors of the race riots at Houston and appealed to race prejudice. In *August* v. *United States*,[8] in a prosecution during the war, the United States district attorney went so far in appealing to the prejudices of the jury and invoking the war spirit as to compel the Circuit Court of Appeals to grant a new trial. Indeed, Coke's much-criticised "I thou thee, thou traitor," pales beside the abuse poured forth by recent American prosecutors.[9]

Something in the way of intemperate speech may be excused to prosecutors in view of the heat engendered by a protracted and bitterly contested trial. But deliberate and brutal extortion of confessions [10] and

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[3] People *v.* Frasco, 187 App. Div. 299, 37 N. Y. Crim. 441.

[4] People *v.* Levy, 186 App. Div. 444, 37 N. Y. Crim. 390.

[5] "She is a negro — look at her skin; if she is not a negro, I don't want you to convict her." Moseley *v.* State, 112 Miss. 855, 73 So. 791 (1916). "And the Attorney General proceeded to say: 'What I have said about these two witnesses goes. I would say the same about any white man that would come into court and testify in favor of a nigger, if I was going to hell the next minute. The state has nothing to withdraw and nothing to apologize for.'" Roland *v.* State, 137 Tenn. 663, 194 S. W. 1097 (1917). "The testimony of one soldier boy, perhaps of one person who was not a Jew, was . . . of greater weight than that of all Jews, however upright, intelligent or numerous, who had knowledge of the facts." Skuy *v.* United States, 261 Fed. 316, 320 (1919). In Flores *v.* State, 198 S. W. 575, the district attorney said to the jury: "If you don't convict the defendant in this case, I am going to have you all indicted and sent to the penitentiary for perjury."

Compare, "Show me a Presbyterian and I will engage to show a lying knave" (Jeffreys in the trial of Alice Lisle, 11 St. Tr. 359); the commitment of Bushel as one of the jury which refused to convict William Penn (Bushel's case, Vaughan, 135).

[6] 224 N. Y. 370.

[7] 214 S. W. (Tex. Cr. App.) 353.

[8] 257 Fed. 388.

[9] "Thou art the most vile and execrable traitor that ever lived." "I want words to express thy viperous treasons." "There never lived a viler viper than thou" (Trial of Raleigh, 2 St. Tr. 26). "He is a Hun . . . a vile ulcer suppurating on the shoulder of decency. He is a moral cancer on the breast of humanity" (People *v.* Vickroy, 182 Pac. (Cal. App.) 764.

[10] People *v.* Shaughnessy, 184 App. Div. 806, 37 N. Y. Crim. 196; Bianchi *v.* State, 171 N. W. (Wis.) 639.

coercion of witnesses [11] has no such excuse. Such proceedings as those in *Bianchi* v. *State*, where the district attorney brought into his office six foreigners, while under arrest, examined them under oath in what looked like and they took to be a judicial proceeding, and then sought to use the admissions so extorted as evidence against them, or as those in *Silverthorne* v. *United States*,[12] where the district attorney, having caused the arrest of the accused, made a high-handed seizure of all their books, papers, and documents, without a shadow of authority, do more to impair our institutions and are more truly inimical to law and order than the crude writings of ignorant visionaries which prosecutors have been pursuing so ruthlessly. For these lawless proceedings are had under color of law by officers of the law who know better. Moreover, these officers would not venture to do such things as were done in *People* v. *Shaughnessy* or *Bianchi* v. *State* in a prosecution of defendants of means or influence, able to employ counsel or well advised of their rights.

In *Venable* v. *State* [13] the trial judge took a hand in the coercion of a witness. The district attorney had taken a written statement from a thirteen-year-old girl in the presence of a magistrate and of the sheriff. On its face this statement used words and expressions which an ignorant girl of thirteen could not have employed and could hardly have understood. When later she denied important statements of fact contained in the writing and testified that she was frightened at being alone before so many men and did what they told her to do because she wanted to go home, the district judge and district attorney threatened her with a prosecution for perjury and the judge read to her the statute as to the penalty for perjury (two to ten years in the penitentiary) and told her of a woman who had been sent to prison for twenty years. As she still insisted on the untruth of important parts of the written statement, the judge read to her an imposing order committing her for contempt and when that did not change her testimony, the judge said (p. 529): "Mr. Sheriff, you can take the witness to jail," and turning to the girl added, "*I suppose you understand that the district court can impose the sentence of death upon a person — actually take the life of a person;* you knew that, didn't you?" In *Rutherford* v. *United States* [14] the trial court adjudged a witness in contempt in the presence of the jury because he insisted he had never seen the accused write and could not testify to his signature, when the court thought he really could.[15] In the case of a prior witness

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[11] Venable *v.* State, 207 S. W. (Tex. Cr. App.) 520.

[12] 40 Sup. Ct. Rep. 182.

[13] 207 S. W. (Tex. Cr. App.) 520.

[14] 258 Fed. 855.

[15] In discharging the witness from custody on a writ of *habeas corpus*, the Supreme Court of the United States said: "We are of opinion that the commitment was void for excess of power — a conclusion irresistibly following from the fact that the punishment was imposed for the supposed perjury alone without reference to any circumstance or condition giving to it an obstructive effect. Indeed, when the provision of the commitment directing that the punishment should continue to be enforced until the contempt, that is, the perjury, was purged, the impression necessarily arises that *it was assumed that the power existed to hold the witness in confinement under the punishment until he consented to give a character of testimony which, in the opinion of the court would not be perjured.*" *Ex parte* Hudgings, 249 U. S. 378, 384.

As the Circuit Court of Appeals very mildly puts it, the judge's conduct "was

on the same trial, who had been similarly threatened, it turned out eventually that the witness had told the truth and the trial judge's dogmatic confidence that she was lying was unfounded.[16] But this experience did not deter him from attempting to coerce other witnesses to such an extent that the Circuit Court of Appeals granted a new trial.

Happily appellate courts have been inclined to stand up manfully against this revival of seventeenth-century methods.[17] But the practice of turning state trials and other important prosecutions into man hunts, with newspapers,[18] police, district attorney and trial judge in full cry after the accused and bent on running him down at all events, must put a severe strain upon elective appellate courts. It ought to be stopped at its source. The bar ought not to countenance the lawlessness of its members who hold office as prosecutors. It should reflect that the judicial persecutions of the seventeenth century and the high-handed conduct of prosecutions for sedition in the latter part of the eighteenth century had much to do with our tying down of prosecutors by technicalities of procedure and depriving trial judges of common-law powers essential to the effective conduct of jury trial.[19] When prosecutors and

very likely to intimidate witnesses subsequently called," even if it did not succeed with this one. Rutherford *v.* United States, 258 Fed. 855, 863.

In the latter case, when counsel for the government could not make a witness for the government swear up to the mark the court took him in hand: "The court is thoroughly satisfied, Mr. Witness, that you are testifying falsely . . . and it becomes the plain duty of the court to commit you to jail, sir, for contempt. . . . *The court desires you to have every opportunity to correct your answers*, if you desire to do so, . . . but I am not going to allow you to obstruct the course of justice here, and if this nation has delegated power enough to this court, and I am very sure it has, to deal with you in the manner proposed, I am going to do it." *Ibid.*, 860.

In the trial of Alice Lisle, when the principal witness for the Crown did not swear up to the mark on a crucial point and after being thoroughly browbeaten said "I am cluttered out of my senses," Jeffreys said from the bench: "Dost thou imagine that any man hereabouts is so weak as to believe thee? It is only thy depraved naughty heart that baulks both thy honesty and understanding, if thou hast any; it is thy studying how to prevaricate that puzzles and confounds thy intellect." 11 How. St. Tr. 348 (1685).

[16] Rutherford *v.* United States, 258 Fed. 855, 857.

[17] See especially the remarks of the Supreme Court of Tennessee in Roland *v.* State, 137 Tenn. 663, 665, 194 S. W. 1097.

[18] People *v.* Williams, 106 Misc. 65, 179 N. Y. Supp. 773, 37 N. Y. Crim. 274.

[19] The intemperate charges of Federalist judges had much to do with creating the distrust of courts which led to legislation prescribing a written charge, prohibiting the trial judge from commenting on the facts and reducing him to the position of a moderator. See Addison, Charges to Grand Juries (appended to ADDISON'S REPORTS), nos. 20, 22, 23, 26 (1800). Those charges were delivered in 1797–1798. Also LOYD, EARLY COURTS OF PENNSYLVANIA, pages 142–149. Judge Addison's style may be seen from the following: "The French have threatened us with pillage, plunder, and massacre. Such threats they have carried into execution in other countries. They have threatened us with a party among ourselves, which will promote their views. Some of them it is said, have told us, that we dare not resent their injuries; for there are Frenchmen enow among us, to burn our cities, and cut our throats. And, it seems, we dare not remove those gentle lambs! Gracious Heaven! Are we an independent nation, and dare we not do this? Shall our constitution, intended as a shield to defend, become a sword to wound us? Have we made a constitution, to restrain our administration from oppressing ourselves, and so restrain it, as to submit our cities to alien incendiaries, and our throats to alien assassins?" *Ibid.*, 307. See also his charge on freedom of the press, *Ibid.*, 288–289. American legislation limiting the power of trial judges begins in North Carolina in 1796 with "An Act to secure the Impartiality of Trial by Jury and to Direct the Conduct of Judges in Charges to the Petit Jury." NORTH CARO-

trial judges revive these obsolete methods in order to procure convictions where there is strong feeling against the accused, they invite a reaction which will cut away even more of what judicial power yet remains. Moreover they invite immediately further extension of administrative action at the expense of the courts. For the elaborate and dilatory process of judicial trial is not needed for man hunts. If law is to be enforced in this fashion, summary administrative action will operate more swiftly, more sensationally, and less expensively.

ENFORCEMENT OF FOREIGN JUDGMENTS. — The courts and text writers have been far from agreement on the nature of a plaintiff's right in a suit to enforce a foreign judgment.[1] This question, as well as that of the principles on which the plaintiff is granted a remedy, is raised in the recent Canadian case of *Bank of Ottawa* v. *Esdale*.[2] In that case an Ontario court gave a judgment for which jurisdiction was lacking. Later the defendant made a general appearance and the court vacated the judgment. Still later the court vacated this order vacating the judgment. An Alberta court gave judgment for the plaintiff in an action on the Ontario judgment.

If the theory is accepted that the plaintiff's original cause of action is merged in the judgment,[3] and that he is suing on a new and separate obligation created by the foreign judgment,[4] it is hard to support the case. For the judgment, when given, was void for want of jurisdiction and would not be recognized abroad;[5] and the order vacating the order to vacate did not purport to do more than to remove the vice from, and thus restore, the original judgment. In other words, although at the time of the last order the court did have jurisdiction, it did not then give a judgment.[6]

And the same objection is met if the theory is accepted that a foreign judgment is given effect as evidence [7] of the original cause of action,[8]

LINA LAWS (1796), c. 452. This is better to be understood when we read of Chief Justice Howard (last Chief Justice of the Colony) that he "was notoriously destitute not only of the common virtues of humanity but of all sympathy whatever for the community in which he lived." JONES, DEFENSE OF THE REVOLUTIONARY HISTORY OF NORTH CAROLINA, 121.

[1] See PIGGOTT ON FOREIGN JUDGMENTS, 2 ed., 4 *ff.*

[2] 1 W. W. 283. For a fuller statement of facts see RECENT CASES, p. 984.

[3] Henderson *v.* Staniford, 105 Mass. 504 (1870). See Suydam *v.* Barber, 18 N. Y. 468, 470 (1858).

[4] See Dunstan *v.* Higgins, 138 N. Y. 70, 33 N. E. 729 (1893); Fisher *v.* Fielding, 67 Conn. 91, 108, 34 Atl. 714, 716 (1895); Baker *v.* Palmer, 83 Ill. 568 (1876); Schibsby *v.* Westenholz, L. R. 6 Q. B. 155 (1870); Godard *v.* Gray, L. R. 6 Q. B. 139 (1870).

[5] Cummington *v.* Belchertown, 149 Mass. 223 (1889).

[6] If the judgment had been appealed from and affirmed, it could be said that the appellate court had given a new judgment incorporating the old, and as the appellate court had jurisdiction its judgment would be recognized abroad. Guiard *v.* De Clermont and Donner, [1914] 3 K. B. 145.

[7] If the judgment is evidence, it is usually spoken of as *prima facie* evidence; for to allow it as conclusive evidence is practically to coincide with the legal obligation theory supported by the cases in note 4, *supra*.

[8] See Tourigny *v.* Houle, 88 Me. 406, 34 Atl. 158 (1896); Grant *v.* Easton, 49 L. T. 645 (1883); Houlditch *v.* Marquess of Donegall, 2 Cl. & Fin. 470 (1834).